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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

ANDREW YOUNG, Administrator
of the ESTATE of DAVID G. YOUNG,
and ANDREW YOUNG, individually,

Plaintiffs,

v.

Civil Action No. 06-C-923
Judge Silver

PAMELA SUE MCINTYRE,
formally known as PAMELA SUE
YOUNG, and THE HUNTINGTON
NATIONAL BANK,

Defendants.

ORDER GRANTING DEFENDANT PAMELA SUE MCINTYRE'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT

This matter comes on for the Court's consideration this 16th day of April, 2007, upon Defendant Pamela Sue McIntyre's Motion and Memorandum for Summary Judgment filed March 7, 2005; upon Plaintiffs' Cross Motion for Summary Judgment and memorandum in support thereof filed March 26, 2007; upon Defendant's Closing Memorandum in Support of Her Motion for Summary Judgment and in Opposition to Plaintiffs' Cross Motion for Summary Judgment filed March 28, 2007; and upon the Rebuttal Memorandum of the Plaintiffs to the Defendant's Memorandum in Opposition to the Plaintiffs' Cross Motion for Summary Judgment filed April 6, 2007.

The Court has carefully considered the Motions and Memoranda with attached exhibits, the entire record of this case, and pertinent legal authority. As a result of these deliberations, the Court has concluded that Defendant Pamela Sue McIntyre's Motion for Summary Judgment

should be granted and Plaintiffs' Cross Motion for Summary Judgment should be denied.

In support of its decision, the Court makes the following findings of fact and conclusions of law:

Standard for Summary Judgment

The standard for granting motions for summary judgment has been often stated by the West Virginia Supreme Court of Appeals as, "A motion for Summary Judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Williams v. Precision Coil, Inc.* 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995), quoting Syllabus Point 1, *Andrik v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992), quoting Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

Findings of Fact

1. The Defendant is the former spouse of Plaintiff's Decedent, David G. Young.
2. The Plaintiff, Andrew Young, is the former step-son of Defendant McIntyre, and is the son of the Decedent.
3. The Decedent died a resident of Berkeley County, West Virginia, on July 31, 2006, and the Plaintiff duly qualified to be the administrator of Decedent's estate.
4. Defendant McIntyre and Decedent were owners in fee of that certain tract or parcel of real estate, situate, lying and being in Arden District of Berkeley County, West Virginia, more particularly described as follows:

Lot No. 18 of Meadows of Arden, containing 4.16 acres, as shown on

a plat and survey thereof dated August 11, 1978, made by William J. Teach, LLS, recorded in the Office of the Clerk of the County Commission of Berkeley County, West Virginia, in Plat Cabinet No. 1, Slide 27, to which plat reference is hereby made for a metes and bounds description of the real estate hereby described.

5. Lot No. 18 of Meadows of Arden is the same tract or parcel of real estate that was conveyed to the Decedent and Defendant McIntyre, then husband and wife, as joint tenants with the right of survivorship, from Decedent and Defendant McIntyre, husband and wife, dated October 2, 1987, and recorded in the Office of the Clerk of the County Commission of Berkeley County, West Virginia, in Deed Book No. 423, at page 625.

6. Defendant McIntyre and Decedent were divorced from the bonds of marriage pursuant to a Final Order of Divorce entered on November 8, 2005, in the Circuit Court of Berkeley County, West Virginia.

7. As part of the divorce proceeding, Defendant McIntyre and Decedent entered into a Property Settlement Agreement dated October 24, 2005.

8. The salient portion of the Property Settlement Agreement from the divorce providing for the jointly held property states as follows in paragraph 2:

> 2. The parties will continue to own the former marital domicile & shall list the property for sale in the Spring of 2006. That Husband will continue to exclusively live in the house & pay the mortgage debts on same. The parties agree to split the cost of repairs to sell the house up to $5,000.00 each. When the house sells, the parties will split the net proceeds equally.

9. The former marital domicile was never listed for sale with any broker, agent or otherwise, and Defendant McIntyre and Decedent did not enter into any contracts for the sale of the

vendable interest, and equitable estate which, at his death, descends to his heirs in the same manner as a legal estate.'

Conclusions of Law

In considering this matter, a review of the language in the Property Settlement Agreement between Defendant McIntyre and Decedent incident to their divorce is necessary. Paragraph number 2 contains the following language:

> 2. The parties will continue to *own* the former marital domicile & shall list the property for sale in the Spring of 2006. That Husband will continue to exclusively live in the house & pay the mortgage debts on same. The parties agree to split the cost of repairs to sell the house up to $5,000 each. When the house sells, the parties will split the net proceeds equally. [Emphasis added].

The Court notes that none of the provisions of paragraph number 2 require either the Defendant McIntyre or Decedent to convey either's interest in the former marital domicile to the other. To the contrary, the provisions of paragraph 2 provide that both parties will continue to own the former marital domicile. Thus, as a practical matter the status quo with respect to the deed to the home which provided for a joint tenancy with right of survivorship remained unaltered.

The Court also notes that paragraph 2 provides that the Decedent would live in the home exclusively and pay the mortgage debt, however, the Court concludes that this provision does not rise to the level of a conveyance of an interest which would destroy any of the four unities. This was an agreement incident to a divorce proceeding in order to facilitate the repair and later sale of the former marital domicile at which point both Defendant McIntyre and Decedent hoped to convey their joint interests to another party.

The case law on this issue supports the Court's conclusion. For example, in *Maudru, supra*, the West Virginia Supreme Court of Appeals discussed the doctrine of equitable

conversion using the following language: "After the execution of a valid *contract of sale* . . ." *Id.* [Emphasis added]. This language contemplates a contract of sale involving an exchange of each party's rights and obligations with respect to the property or equitable conversion. Also, in *Timberlake v. Heflin*, 379 S.E.2d 149 (W.Va. 1989), West Virginia's highest Court concluded: "That where a joint tenant with a right of survivorship has *contracted to buy* a fellow joint tenant's interest, the death of the purchaser does not operate to permit the survivorship incident in the deed to transfer his interest, if the purchaser's heirs or administrator are willing to complete the purchase contract." [Emphasis added].

In *Timberlake,* as part of a property settlement agreement where the former marital domicile was held by joint tenancy with right of survivorship the defendant wife agreed to *convey* her interest in the home to her former spouse. Again, it is the *conveyance* of an *interest* that gives rise to equitable conversion, and, in the case at bar, there was no such conveyance of an interest either between Defendant McIntyre and Decedent themselves or between Defendant McIntyre and Decedent and another party. Instead, there was an agreement that Defendant McIntyre and Decedent would continue to own the property together as they had in the past until such time as certain repairs could be made and the house put on the market at which point both Defendant McIntyre and Decedent hoped to convey their joint interests in the former marital domicile to another party.

This being the case, the Court concludes that because there are no genuine issues of material fact, and, further, that because the four unities remain intact despite the provisions of the Property Settlement Agreement, Defendant McIntyre is entitled to the entire fee simple interest in Lot 18 of Meadows of Arden Subdivision, Berkeley County, West Virginia, as the joint tenancy

provisions of the deed dictate that Defendant McIntyre is the owner of the property upon the death of the Decedent coming first.

WHEREFORE, in consideration of all the foregoing, this Court does hereby **ADJUDGE** and **ORDER** that Defendant Pamela Sue McIntyre's Motion for Summary Judgment is **GRANTED**, and Plaintiffs' Cross Motion for Summary Judgment is **DENIED**.

The objection and exception of the parties to any adverse findings or rulings of the Court are noted.

The Clerk shall retire this matter from the active docket and place it among cases ended.

The Clerk shall enter this Order as of the day and date first hereinabove written and shall forward attested copies to the following counsel of record:

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Gray Silver, III, Judge
Berkeley County Circuit Court

A TRUE COPY
ATTEST
Virginia M. Sine
Clerk Circuit Court
By: _____
Deputy Clerk